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 10 Attorneys for Defendants
 11
 12 THE REGENTS OF THE UNIVERSITY OF
 13 CALIFORNIA, ROBERT BIRGENEAU,
 14 CONSTANCE PEPPERS CELAYA, ADAN
 15 TEJADA, VICTORIA HARRISON, ALLAN
 16 KOLLING, TOM KLATT and SUSAN VON
 17 SEEBURG

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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

19 CHRISTINE CHANG, individually and as
 20 Guardian ad Litem for ERIC SUN,
 21 disabled,

22 Plaintiff,

23 v.

24 ROCKRIDGE MANOR
 25 CONDOMINIUM, et al.,

Defendants.

Case No. C-07-4005 EMC

MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF THE
 MOTION/APPLICATION OF
 DEFENDANTS THE REGENTS OF THE
 UNIVERSITY OF CALIFORNIA, ROBERT
 BIRGENEAU, CONSTANCE PEPPERS
 CELAYA, ADAN TEJADA, VICTORIA
 HARRISON, ALLAN KOLLING, TOM
 KLATT AND SUSAN VON SEEBURG FOR
 RELIEF FROM DEFAULT/OPPOSITION
 TO MOTION FOR DEFAULT JUDGMENT
 AND LEAVE TO FILE MOTION TO
 DISMISS

Date: November 28, 2007
 Time: 10:30 a.m.
 Courtroom: C
 Judge: Magistrate Judge Edward M. Chen

I. **INTRODUCTION**

This is an action brought by plaintiffs in the aftermath of an unsuccessful civil action in Alameda Superior Court against defendant Constance Peppers Celaya for an alleged assault that

1 occurred in a privately owned condominium complex in Oakland in 2001. Three years after
2 judgment was entered in Ms. Celaya's favor, Plaintiffs Christine Chang and Eric Sun have filed
3 the instant Complaint against the University of California and multiple U.C. Berkeley officials
4 alleging five causes of action against all named defendants for: (1) Violations of Civil Rights, (2)
5 Malicious Prosecution/Abuse of Process, (3) Negligence, (4) Conspiracy and (5) Fraud.

6 It appears from the Complaint that the claims arise from Plaintiffs' contention that U.C.
7 Berkeley Officials should have provided Plaintiff's with employment records concerning Ms.
8 Celaya when she requested them, and they should have taken action in response to Plaintiffs'
9 notification to the University that she had allegedly been assaulted by Ms. Celaya (in a private
10 dispute in a laundry room of the condominium complex).

11 Plaintiff Christine Chang has served an incomplete and inaccurate Proof of Service
12 indicating that all of the University of California affiliated defendants (The Regents Of The
13 University of California, Robert Birgeneau, Constance Peppers Celaya, Adan Tejada, Victoria
14 Harrison, Allan Kolling, Tom Klatt and Susan Von Seeburg ("University defendants") were
15 "personally served" at two addresses indicated on the proof on September 7, 2007. [See Proof of
16 Service dated September 7, 2007 attached as Exhibit A to Conant Declaration].

17 Plaintiffs subsequently filed and mail-served several "Motion(s) for Default Judgment Be
18 Entered" [sic] on each University defendant on October 5, 2007.

19 As of the filing of the instant motion/application, the docket does not show that a default
20 judgment has been entered against any defendant.

21 Nevertheless, it appears that service was affected on U.C. Berkeley Chancellor Robert
22 Birgeneau, Victoria Harrison and Allan Kolling via substitute service on September 7, 2007. The
23 remaining parties were not properly served with Summons and Complaint (see accompanying
24 declarations).

25 In order to facilitate getting this matter at issue and before the Court, all of the University
26 defendants are prepared to appear via motion to dismiss which is being filed concurrently with the
27 instant application. To the extent that some of the University defendants did not file an
28 appearance within twenty days of being served, defendants seek relief from the default and leave

1 to file their Motion to Dismiss on the grounds that the failure to file a timely response to the
2 complaint was the result of a mistake of fact and excusable neglect .

3 **II. FACTS RELATING TO DEFAULT**

4 On or about September 10, 2007, the third party administrator for The Regents of the
5 University of California received notice from the Office of General Counsel for the Regents of
6 the University of California that a blind suit had been filed by Christine Chang and Eric Sun
7 against several defendants, including several University of California, Berkeley officials. Shortly
8 thereafter, Jim Taylor was assigned as the claims representative to handle the Chang matter,
9 including assigning the defense of the case to outside counsel.

10 Due to the medical leave of another claims representative, Mr. Taylor's case load has
11 increased significantly in the last two months, requiring him to be out of the office more
12 frequently to attend Mandatory Settlement Conferences, mediations and campus coordination
13 meetings for both general liability and employment law suits filed against The Regents. In
14 addition, the number of incoming, new cases has doubled during this time. As a result of the
15 increased work load, Mr. Taylor inadvertently believed the Chang complaint had been filed in
16 state court and believed that none of the University of California affiliated witnesses had been
17 served with summons and complaint as of September 10, 2007.

18 Due to the press of other time-sensitive business, Mr. Taylor did not have the opportunity
19 to assign the matter to outside defense counsel until October 4, 2007. The delay in assigning the
20 case to defense counsel was inadvertent and due to Mr. Taylor's work backlog and my belief that
21 service had not been affected on any of the named defendants. There was no reference in the
22 assignment letter to defense counsel to any service on the University of California defendants, as
23 it was still Mr. Taylor's belief that no service had been effected.

24 It was not until the week of October 8th that Mr. Taylor learned from defense counsel that
25 the court electronic docket showed that plaintiff had filed a proof of service representing that all
26 of the University of California affiliated defendants had been served on September 7, 2007. At
27 that time Mr. Taylor reviewed his file and discovered that the Office of General Counsel had
28 previously advised that Summons and Complaint had apparently been served, via substituted

1 service, on the Chancellor of University of California, Berkeley, Robert Birgeneau on September
2 7, 2007. Mr. Taylor had no information that any of the other named University of California
3 defendants were properly served with Summons and Complaint. [See Declaration of Jim Taylor].

4 Meanwhile, defense counsel (GayLynn Conant) received and reviewed copies of the
5 Summons and Complaint and Mr. Taylor's defense assignment on Monday, October 8, 2007. A
6 review of the Court's electronic docket showed plaintiffs had filed a proof of service representing
7 that each of the eight named University of California affiliated defendants had been personally
8 served on September 7, 2007 which suggested all of the University defendants had failed to
9 respond to the complaint within twenty days.

10 Defense counsel contacted each of the defendants to determine the actual service status
11 and it appeared that several of the defendants had not been properly served with Summons and
12 Complaint. [See Von Seeburg, Tejeda, Klatt, Conant and Celaya Declarations]. Meanwhile, On
13 October 10, 2007 defense counsel was advised that several of the University defendants had
14 received a "Motion for Default Judgment Be Entered" via mail. As there appeared to be multiple
15 defenses to the claims asserted against the University defendants, defense counsel promptly began
16 preparation of a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) or, in the
17 alternative, for a more definite statement pursuant to FRCP 12(e).

18 The motion to dismiss, and the instant motion/application for relief from default were
19 filed as quickly as possible given defense counsels existing work load and calendar and within
20 seven business days of defense counsel's initial receipt and review of the Summons and
21 Complaint.

22 As several other named defendants have not yet appeared in the action, the case is not yet
23 at issue, so there can be no prejudice to the Plaintiffs if defendants are permitted to appear and
24 have their Motion to Dismiss heard as noticed.

25 **III. FACTS RELATING TO MERITORIOUS DEFENSE**

26 Without repeating the entire motion to dismiss, there are multiple defenses to the instant
27 action on behalf of all of the University defendants. The grand majority of the 139 paragraph
28 Complaint appears to relate to a 2001 alleged assault on Ms. Chang and/or Mr. Sun at a

1 residential condominium complex in Oakland by defendant Celaya. [See, e.g. paragraphs 62, 69].
 2 This alleged incident was the subject of a civil lawsuit filed by plaintiffs Christine Chang and Eric
 3 Sun in Alameda County Superior Court on April 2, 2002. The case was tried and judgment
 4 entered in Ms. Celaya's favor on August 11, 2004. [See Request for Judicial Notice, Exhibits A
 5 and B, the complaint and judgment in action number 2002-046048 and paragraph 99 of the
 6 instant complaint].

7 Meanwhile, plaintiffs allege that the day after the 2001 "assault/battery," she contacted the
 8 U.C. Berkeley Police Department ("UCBPD"), Ms. Celaya's employer, to complain about Ms.
 9 Celaya. "A few days later" Ms. Chang was advised by UCBPD that it would not take any action
 10 concerning this (off-campus) incident and the Complaint alleges that the UCBPD "took no
 11 action" in response to the civil complaint filed in Alameda County Superior Court. [Paragraphs
 12 115 and 116].

13 Plaintiff also complains that she was not provided with Ms. Celaya's UC Berkeley
 14 personnel file, although the complaint admits that none of her attorneys ever subpoenaed Ms.
 15 Celaya's "police offensive training records" while the prior case was pending [Paragraph 117].

16 A year after judgment was entered in Ms. Celaya's favor, Ms. Chang filed a Motion to
 17 Vacate/Set Aside the Judgment. That motion was denied on September 29, 2005 as untimely by
 18 approximately six months. [Paragraph 125]. The Complaint alleges that around this time (the
 19 Complaint is vague as to time), Ms. Chang "mailed subpoena [sic] to U.C. Berkeley Police
 20 Department for aggravated assault/battery Defendant Constance Peppers Celaya's police
 21 offensive training and update records." [Paragraph 126]. Although it is unclear from the
 22 Complaint, it appears that Ms. Chang was seeking production of a portion of Ms. Celaya's
 23 personnel file at the September 16, 2005 hearing on her tardy motion to vacate the judgment. The
 24 order denying Ms. Chang's motion to vacate is silent on any purported subpoena issue. [See
 25 Request for Judicial Notice, Exhibit C].

26 Thereafter, Ms. Chang alleges she "wrote a letter with evidence to Defendant U.C.
 27 Berkeley Chancellor Robert Birgeneau" and that Chancellor Birgeneau "delegated his duties to
 28 his staffs." [Paragraph 133]. The Complaint does not contain any allegations that any actions by

1 any of the University officials were motivated by personal issues or for personal gain.

2 Thus, it appears there are multiple defenses to the Complaint including:

- 3 • The claims asserted against the University defendants are barred by the immunity
4 afforded to state public entities and their officials by the Eleventh Amendment to
5 the U.S. Constitution;
- 6 • The claims asserted against the University defendants are barred by the implied
7 immunity afforded to public employees not otherwise immune by virtue of the
8 Eleventh Amendment to the U.S. Constitution;
- 9 • Plaintiff's federal civil rights claim fails as no cognizable interest under §1983 has
10 been identified and the vague, conclusory allegations of university participation in
11 civil rights violations are insufficient to state a cause of action;
- 12 • The tort claims are barred by immunities available to the University defendants;
- 13 • The tort claims asserted are barred by the litigation privilege [California Civil
14 Code §47(b);
- 15 • All causes of action asserted against the University defendants concerning the
16 "pre-judgment conduct" are barred by the applicable statute of limitations;
- 17 • All causes of action asserted against the University defendants are without merit as
18 plaintiffs' Complaint is devoid of facts sufficient to state a cause of action for any
19 conceivable theory in any event.
- 20 • Christine Chang has no standing to represent plaintiff Eric Sun in *propria persona*.

21 **IV. AUTHORITY FOR RELIEF FROM DEFAULT**

22 Rule 55(c) of the Federal Rules of Civil Procedure provides: "For good cause shown the
23 court may set aside an entry of default and, if a judgment by default has been entered, may
24 likewise set it aside in accordance with Rule 60(b)."

25 Since provisions for relief are remedial in nature, they may be liberally applied and default
26 judgments are generally disfavored. Where a defendant seeks timely relief from default and has a
27 meritorious defense, doubts about relief should be resolved in favor of granting the motion or
28 application for relief from default. In re Hammer, 940 F.2d 524, 525 (9th Cir. 1991); Pena v.

1 Seguros La Comercial, S.A. 770 F.2d 811, 814; Schwab v. Bulluck's, Inc. 508 F.2d 353, 355 (9th
 2 Cir. 1985).

3 Mistake, inadvertence, surprise or excusable neglect constitutes "good cause" for relief
 4 from default. Chrysler Credit Corp. v. Macino, 710 F.2d 363, 368 (7th Cir. 1983). Where a
 5 default judgment is obtained because of a mistaken understanding of the facts concerning the duty
 6 to respond or mistaken information as to the date service of process is affected, relief from default
 7 is appropriate. See, e.g. 999 v. Cox & Co. 574 F.Supp. 1026, 1029 (ED MO 1983). In this case,
 8 there was considerable confusion as to whether service of process had been affected and an
 9 inadvertent delay in assigning the case to outside defense counsel on behalf of all of the
 10 University defendants. There has been no culpable conduct on the part of any defendant as there
 11 has been no intent to take advantage of the opposing party or interfere with judicial decision-
 12 making, or otherwise manipulate the legal process. See, TCI Group Life Ins. Plan v. Knoebber,
 13 244 F.3d 691, 697. Likewise, the case is not at issue, no Case Management Conference has
 14 occurred and the Initial Disclosure deadline has not lapsed. Thus, there is no basis to any claim
 15 by plaintiffs of prejudice.

16 Consequently, defendants request that they be relieved from any default (in terms of
 17 failure to respond to the Complaint within 20 days of alleged service) and that their Motion to
 18 Dismiss be heard on the noticed date of November 28, 2007, a date in which another defendant's
 19 (Albert Combes) motion to dismiss is already set to be heard.

20 Dated: October 17, 2007

LOMBARDI, LOPER & CONANT, LLP

22 By:


 23 GAYLYNN KIRN CONANT
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